BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
v.	)	Case No. GC-2011-0098
	)	
Laclede Gas Company,	)	
Respondent.	)	

<u>LACLEDE GAS COMPANY'S</u>
<u>MOTION TO ADOPT LACLEDE'S ISSUE #1 FOR THE STAFF'S COMPLAINT</u>

COMES NOW Laclede Gas Company ("Laclede" or "Company") and files this Motion to Adopt Laclede's Issue #1 for the Staff's Complaint, and in support thereof, states as follows:

1. Laclede's CAM has a definition of fair market price on page 8 that applies generally to affiliate transactions, and definitions of fair market price on pages 13-14 that apply specifically to gas supply affiliate transactions. Staff's complaint attacks neither definition; rather, Staff's allegation is that Laclede omitted fully distributed cost from its gas supply definition on pages 13-14.

2. On May 19, 2011, Staff and OPC filed a list of issues in this case defining issue #1 in a very broad manner. It states "Does Laclede's Cost Allocation Manual (CAM) violate the pricing standards of the Affiliate Transaction Rules?" Laclede knew that OPC intended to use this broad definition to argue that Laclede's general definition of "fair market price" on page 8 of its CAM is faulty, and OPC in fact did make this argument in its May 31 Response to Laclede's Limited Concurrence in the List of Issues. OPC addressed this issue for the first and only time in the rebuttal testimony of its witness, Barbara Meisenheimer, on April 19, 2011. However, all of the other pleadings,

testimony and orders in this case refer only to Laclede's alleged failure to include fully distributed cost in its calculation of the pricing of gas supply transactions, as set forth on pages 13-14 of its CAM. Because the complaint did not inform Laclede of any facts pertaining to OPC's new issue, it should not be included in the list of issues to be decided in this case. Laclede requests that the Commission adopt Laclede's Issue #1 from its List of Issues filed on May 19, 2011 for Staff's Complaint, rather than OPC's Issue #1.

FACTS

3. On October 6, 2010, Staff filed a complaint against Laclede initiating the above captioned case. On October 7, Staff filed an amended complaint that was identical to the original complaint except for a change in the prayer for relief. One of the main counts of the complaint accused Laclede of using a CAM that violated the asymmetrical pricing standards of the Commission's Affiliate Transaction rules ("Affiliate Rules"). Specifically, Staff alleged that Laclede's CAM priced gas supply transactions at a fair market price, whereas the Affiliate Rules required the Company to make a comparison between fair market price (FMP) and fully distributed cost (FDC). Staff complained that Laclede unlawfully omitted FDC from the CAM's treatment of gas supply transactions. A copy of this section of the complaint is attached hereto as Exhibit 1.

4. The pricing standards are referred to as asymmetrical, because they generally require that when a utility buys from its affiliate, it is required to buy at the *lower* of FMP and FDC, and when a utility sells to its affiliate, it is required to sell at the *higher* of FMP and FDC.

5. Laclede filed an answer and motion to dismiss the complaint on November 8, 2010. In that pleading, Laclede addressed the Staff's complaint on this

topic in a long narrative entitled "The Role of FDC in Gas Supply Affiliate Transactions." (November 8, 2010 Answer, pp. 5-8)

6. On November 22, 2010, OPC filed its Response to the Joint Motion to Dismiss, in which OPC summarizes the Staff's Amended Complaint. OPC states "The Staff's Amended Complaint further alleges that **gas supply transactions** between Laclede and LER are in violation of the Commission's rules because they provide financial advantages to LER. (OPC November 22, 2010 Response, p. 1, emphasis added)

7. Staff filed its second amended complaint on November 22, 2010, and repeated its claim that the CAM fails to require Laclede to use asymmetrical pricing for transactions with its gas marketing affiliate. A copy of Count II of Staff's second amended complaint is attached hereto as Exhibit 2.

8. Laclede answered the second amended complaint on December 10, 2010, stating in response to Count II that it had in fact made the required FMP-FDC comparison in pricing gas supply transactions with LER. Laclede addressed no subjects other than the FDC issue pertaining to gas supply affiliate transactions.

9. Direct Testimony was filed in this case on March 22, 2011. Staff's direct testimony, sponsored by Charles Hyneman, addressed the gas supply portion of Laclede's CAM (pages 13-14) and reiterated its allegation that this portion of the CAM violated the asymmetrical pricing standards because it failed to include FDC. On page 9 of Mr. Hyneman's direct testimony, he mentions the section of the CAM beginning on page 7, the same section raised by OPC, but Mr. Hyneman's testimony on that section is *favorable* to Laclede, as he uses that section as an example of where Laclede included both FMP and FDC in determining pricing standards. He then compares that section to

page 13 of the CAM concerning gas supply transactions, where the CAM refers only to FMP.

10. Laclede's direct testimony also addressed only the gas supply portion of the CAM and, as it had stated in its answer, Laclede explained how it had accounted for FDC in pricing gas supply affiliate transactions. No mention is made of the general portion of the CAM on pages 7-8.

11. OPC filed no direct testimony.

12. Rebuttal Testimony in this case was filed on April 19, 2011. Staff again addressed only the portion of the CAM dealing with gas supply affiliate transactions, and only the alleged omission of FDC. (Hyneman Rebuttal, pp. 13-15) Staff makes no mention of the pricing standards in the non-gas, or general, portion of the CAM.

13. Laclede's rebuttal testimony likewise addressed only the FDC issue regarding gas supply affiliate transactions.

14. OPC filed rebuttal testimony on April 19, in which its witness was asked the question: "Do you agree with Laclede's definition of fair market price?" The witness answered that she did not agree with the definition on page 8 of the CAM, which is the general section of the CAM, and does not apply to gas supply.

15. Staff and Laclede both filed surrebuttal testimony on May 12, 2011. Again, none of that testimony addressed the definition of FMP on page 8 of the CAM. Laclede did respond to OPC's rebuttal testimony on this topic, but only to the extent of pointing out that it was not relevant to the claims raised in the case. OPC filed no surrebuttal testimony.

16. On May 26, 2011, the Commission issued its order denying Staff's motions for summary determination and for dismissal of Laclede's counterclaim, and also denying Laclede's motion for leave to request summary determination. In the May 26 order, the Commission described the three counts in this case, referring to Count II as alleging that "Laclede's Cost Allocation manual (CAM) fails to comply with the Commission's affiliate transaction rules because it does not require Laclede to use asymmetrical pricing for its transactions with its gas marketing affiliate." The Commission did not address any other issues on this topic.

ARGUMENT

17. This is Staff's complaint case. Staff established the nature of the complaint pursuant to 4 CSR 240-2.070(5). As the respondent, Laclede answered the complaint raising grounds of law and of fact in its answer to the complaint, as provided in Rule 2.070(8). The pricing issue raised in the complaint in this case refers to Laclede's alleged failure to take FDC into account on pages 13-14 of its CAM in pricing gas supply affiliate transactions. OPC's issue regarding the definition of fair market price on page 8 of the CAM does not appear anywhere in the complaint, the amended complaint, or the second amended complaint. It was not addressed in Laclede's answer. It was not mentioned in any of the pleadings.[1] It was not discussed in any of the direct testimony, except that Staff's direct testimony referred to the section of the CAM that included page 8 as a positive example of how the FMP-FDC comparison should look. It was not addressed by the Complainant, Staff, in any of its testimony. And it was not mentioned

[1] Even OPC's November 22, 2010 pleading references Staff's claim by mentioning only gas supply transactions.

by the Commission in describing the complaint in a May 26, 2011 order. It is simply not an issue to be decided in this case.

18. Although OPC testified to this matter in rebuttal, it did not rebut any assertions made in any of the direct testimony. In its May 31 response to Laclede's Limited Concurrence in the List of Issues, OPC claimed that it was rebutting the following statement on page 2 of Laclede witness Michael Cline's direct testimony: "The CAM dictates that Laclede use fair market price (FMP) for gas supply purchases and sales with its affiliates." OPC is wrong for two reasons. First, the FMP referred to by Mr. Cline is the FMP used specifically for gas supply transactions (pp. 13-14 of the CAM), and is not the FMP used for general non-gas transactions (page 8 of the CAM) referred to in OPC's testimony. Second, a review of the context of Mr. Cline's testimony shows the transparency and weakness of OPC's argument. The question on page 2 was an introductory question asking Mr. Cline to state his understanding of Staff's allegation regarding asymmetrical pricing. Mr. Cline stated his belief that Staff's claim is that Laclede violated the asymmetrical pricing standards because it failed to include FDC in the pricing of gas supply transactions, but instead used only FMP for such transactions. There is absolutely nothing in Mr. Cline's assessment of Staff's complaint that would justify OPC raising an issue over the definition of FMP, much less the FMP used in a different section of the CAM.

19. OPC claims that Laclede is trying to "silence all arguments" that OPC would like to raise regarding other sections of the CAM. This is nonsense. Laclede is not silencing anything. If OPC believes that a part of the CAM does not comply with the Affiliate Rules, OPC is free to raise the matter with Laclede. If the matter is not resolved

to OPC's satisfaction, OPC is of course free to file a complaint. If another party should file a complaint on that same issue, OPC is entitled to be a party to such a case and to file testimony on the subject. What OPC is not free to do is file rebuttal testimony six months into a complaint case on a subject that was clearly not raised in the complaint and that no party, including the Complainant, had ever mentioned in any pleading or prior testimony.

20. In fact, Laclede is willing to accept OPC's rebuttal testimony as raising the matter for discussion, and has already discussed the matter with OPC at a meeting on June 9, 2011.

21. Laclede is not seeking to silence OPC, but given the overwhelming weight of the evidence, OPC is trying to ambush Laclede by interposing an issue into the case that obviously does not belong. A complaint cannot survive a motion to dismiss if it does not allege ultimate facts informing the defendant of what plaintiff will attempt to establish at trial. ***State of Missouri ex rel. Bibbs v. Director of Revenue***, 237 S.W.3d 252 (Mo. App. W.D. 2007) Because no facts were alleged in the Staff's complaint (or in its prefiled testimony) informing Laclede that Staff, or any other party for that matter, intended to establish at hearing the impropriety of the FMP definition in the non-gas section of the CAM, the issue cannot be included in the list of issues to be decided in this case.

WHEREFORE, Laclede Gas Company respectfully requests that the Commission issue an order adopting Issue #1 in the Staff Complaint from Laclede's list of issues and denying the Issue #1 filed by Staff and OPC.

Respectfully submitted,

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ATTORNEYS FOR LACLEDE GAS COMPANY

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the parties to this case on this 10th day of June, 2011, by hand-delivery, e-mail, fax, or by United States mail, postage prepaid.

/s/ Gerry Lynch

EXCERPT FROM STAFF COMPLAINT AND AMENDED COMPLAINT PERTAINING TO ALLEGED VIOLATION OF ASYMMETRICAL PRICING

Laclede's violation of the Rule's Asymmetrical Pricing Provisions

30. Laclede's CAM for Energy-Related Goods and Services indicates that "[t]o ensure compliance with both the transfer pricing and anti-discrimination provisions of the affiliate transactions and marketing affiliate transactions rules…the following standards will be applied to the purchase and sale of energy-related goods and services including natural gas supplies, transportation and storage capacity, between Laclede Gas Company and affiliated and unaffiliated entities alike."

31. When it compensates LER for goods or services related to gas supply, if Laclede is not calculating both the fair market price [2] for the goods or service, and Laclede's fully distributed cost[3] for the goods or service, and paying the lower of the two values, it is overpaying LER in violation of the Commission's affiliate transactions rules. 4 CSR 240-40-015(2)(A)(1) and (3)(A).

32. When Laclede transfers information, assets, goods or services related to gas supply to LER and Laclede is not calculating both the fair market value and Laclede's fully distributed cost, documenting both calculations, and charging LER the higher of the two values, Laclede is in violation of the Commission's affiliate transactions rules. 4 CSR 240-40.015(2)(A)(2) and (3)(B).

33. In other words, Laclede's current CAM does not require Laclede's gas supply purchases from LER to be the lower of Laclede's fully-distributed cost or the fair market value but only requires "fair market price."

34. Laclede's provision for gas supply sales to affiliates does not require the sale to be the higher of fair market value or Laclede's fully distributed cost. Contrary to the Rules,

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[2] Fair market value is traditionally considered to be the amount something would sell for in an open market between a willing buyer and a willing seller who are both knowledgeable, informed and prudent and who are acting independently of each other.

[3] Fully distributed cost (FDC) means a methodology that examines all costs of an enterprise in relation to all the goods and services that are produced. The FDC requires recognition of all costs incurred directly or indirectly used to produce a good or service. Costs are assigned either through a direct or allocated approach. Costs that cannot be directly assigned or indirectly allocated (e.g., general and administrative) must also be included in the FDC calculation through a general allocation.

the CAM defines fair market price as the average price[4] of other similar sales. (Attachment A, page 14.)

35. Laclede's CAM does not control its affiliate practices when it violates the Commission's Rules.

36. If a gas utility determines a non-compliant transaction is in the interest of its customers, the rules make provision for the utility to present its case to the Commission. 4 CSR 240-40.015(11)

37. Laclede has never requested a waiver or variance of the application of the asymmetrical pricing rules to its non-compliant transactions or for its unlawful CAM provisions.

38. If Laclede truly believes its transactions are to its customer's benefit instead benefitting its unregulated operations to the detriment of its customers, it should have files for a variance.

39. If Laclede believes FDC is same as FMV it should ask for a waiver.

[4] Gas supply sales shall be the fair market price which shall be determined as the average price of similar purchases made by Laclede Gas Company or other firms from non-affiliated entities entered into at similar times for similar duration and location of such purchases. If such purchases do not exist, the fair market price will be determined for the location and period in question by using an industry accepted index or index prices applicable to such location published in either Gas Daily, Inside FERC, or other similar publication widely accepted in the industry for determining the value of such gas supplies.

EXHIBIT 2

EXCERPT FROM STAFF'S SECOND AMENDED COMPLAINT PERTAINING TO ALLEGED VIOLATION OF ASYMMETRICAL PRICING

COUNT II

21. Staff herein realleges and incorporates by reference paragraphs 1-20.

22. Laclede justifies its lack of Rule compliance by claiming it is following its Cost Allocation Manual (CAM)(see Attachment A).

23. On its face, Laclede's CAM violates the Commission's Rules.

24. Among other things, its CAM does not require Laclede to use asymmetrical pricing for transactions with its gas marketing affiliate. 4 CSR 240-40.3(A).

25. The rules do not permit an exception to the asymmetrical pricing standards for gas services.

26. Laclede may not use another method for calculations of the price at which affiliate transactions are permissible under the rules without Commission approval. 4 CSR-240-40-015 (2)(A)(1) and (3)(A), 4 CSR 240-40.016 and 4 CSR 240-40.015(11).

27. Nor do the Rules permit Laclede to make up its own Rules as to how these transactions will be priced.

28. Because of Laclede's failure to apply the asymmetrical pricing, the Rule deems Laclede to be giving LER a prohibited financial advantage. 4 CSR 240-40.016(3)(A).

29. If Laclede believed it was a reasonable approach to create a different rule for itself and its gas services transactions, it could have filed for either Commission approval of its CAM or for a variance from the Rule provisions.

30. "The regulated [utility] shall not participate in any affiliated transactions which are not in compliance with this rule, except as otherwise provided in section (10) of this rule [which provides a procedure by which Laclede could have obtained a variance from these standards]." 4 CSR 240-40.015(2)(D).

31. Laclede has failed to request a variance.